74 FLRA No. 51

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 228
(Union)

0-AR-5936

_____

DECISION

September 30, 2025

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Before the Authority: Colleen Duffy Kiko, Chairman, and Anne Wagner, Member
(Chairman Kiko concurring)

I. Statement of the Case

Arbitrator Louis M. Zigman issued an award finding an employee (the grievant) engaged in misconduct, but the Agency violated the parties' collective-bargaining agreement by suspending the grievant for three days. As remedies, the Arbitrator directed the Agency to remove the suspension from the grievant's record, and make the grievant whole for any loss of pay and benefits. The Agency filed exceptions to the award on exceeded-authority and essence grounds. For the reasons explained below, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant is a loan specialist whose primary job duties include reviewing loan applications, training, and mentoring other loan officers and lenders in district offices. Between September 11, 2020, and November 19, 2020, the grievant's supervisor sent her a series of emails requesting corrections to specific loan applications and updates on her work, but the grievant did not respond. The grievant also sent an email to her supervisor calling him "rude and obnoxious."[1] On September 14, 2020, the grievant requested to be transferred to a different supervisor, alleging her supervisor "was causing her mental anguish and health issues."[2] The Agency denied that request.

The grievant began preplanned leave on November 19, 2020. While on leave, she visited her physician, who determined that since July 2020, the grievant had several health issues, including anxiety and extreme stress "due to increased work stressors."[3] The grievant's physician directed her to remain off work until January 15, 2021. On January 5, 2021, the Agency sent the grievant a notice of proposed suspension based on her pre-leave conduct. The grievant provided a response, in which she asserted that she received no warnings about her work or conduct before the Agency issued the notice.

Subsequently, the Agency suspended the grievant based on three charges, each with multiple specifications: (1) unsatisfactory performance, (2) failure to follow directives, and (3) unprofessional communication (charges 1, 2, and 3, respectively). The Union filed a grievance alleging the Agency violated the agreement by suspending the grievant without "just and sufficient cause."[4] The Agency denied the grievance, and the parties proceeded to arbitration.

At arbitration, the parties did not stipulate an issue. The Arbitrator framed the issues as whether "the disciplinary action taken against [the grievant was] . . . for just and sufficient cause? If not, what shall the remedy be?"[5]

The Arbitrator determined the Agency established a prima facie case supporting charges 2 and 3.[6] However, he found the Union rebutted the Agency's prima facie case by establishing "mitigating facts" that "justif[ied] the conclusion that the suspension was

[1] Award at 19 (quoting Exceptions, Agency Composite Ex. 1, Attach. S at 1).
[2] *Id.* at 3.
[3] *Id.* at 5.
[4] *Id.* at 2 (emphasis omitted).
[5] *Id.* (emphasis omitted).
[6] *Id.* at 19 (finding the grievant "ignored [her supervisor's] requests and later directions," and sent an email constituting "insolence and unprofessional language," both of which would "normally warrant corrective disciplinary action"). The Arbitrator's findings regarding the first charge are inconclusive. The Arbitrator acknowledged that the Agency disciplined the grievant for three charges, including four incidents of "unsatisfactory performance," *id.* at 6, 11, and he found that the grievant "arguably committed *three* different offenses – some repeatedly," *id.* at 22 (emphasis added), but he did not make express findings specifically concerning the unsatisfactory performance charge.

unreasonable."[7] Specifically, he found the evidence demonstrated the grievant had a history of "excellent performance" before September 11, 2020, the date upon which she began to disregard her supervisor's emails.[8] He also found the grievant was "experiencing a great deal of stress and anxiety" during the period of alleged misconduct, which could have been partially caused by her supervisor.[9] The Arbitrator further found that Agency management was aware of the grievant's reassignment request, and that her supervisor had noted she seemed "unusual" during the relevant period.[10]

The Arbitrator also determined that several of the factors for assessing penalties established in *Douglas v. Veterans Administration* (*Douglas*)[11] favored the Union's position that the suspension was unreasonable under the circumstances. Specifically, he credited the grievant's discipline-free record during her eight-year career; her "very positive work history along with many laudatory subjective statements in her performance evaluations"; her ability to perform her duties; the "relatively minor [and] repetitive" nature of the "offenses," which were "the result of her mental health"; the Agency's failure to warn her of "possible disciplinary action[s]"; her ability to be rehabilitated; her lack of malice; and the existence of effective alternative sanctions, specifically "counseling."[12]

The Arbitrator further found that the Agency's "Table of Recommended Penalties" for addressing employee misconduct (table) covered the grievant's "purported misconduct," and that its recommended discipline for a first offense ranged from a reprimand to suspension of up to five days for charge 2, and up to fourteen days for charge 3.[13] However, he also noted the table's explanation that it is "a *guide* to determine a reasonable penalty."[14]

Based on these findings, the Arbitrator concluded that "[j]ust and sufficient cause did *not* exist" to suspend the grievant.[15] Accordingly, he found the Agency violated the agreement by suspending the grievant, and the violation constituted an "unwarranted personnel action."[16] As remedies, the Arbitrator directed the Agency to remove the suspension from the grievant's record, and "make the grievant whole for any [loss of] pay and benefits."[17]

On December 8, 2023, the Agency filed exceptions to the award, and on January 8, 2024, the Union filed an opposition.

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Agency argues the Arbitrator exceeded his authority by resolving an issue not submitted to arbitration because the parties did not request he decide whether the suspension was reasonable.[18] Specifically, the Agency argues the Arbitrator improperly substituted "his own personal judgment" and "perform[ed] his own *Douglas* analysis" in determining the "reasonableness" of the suspension.[19] The Agency further contends that, in doing so, the Arbitrator ignored his own findings that the grievant engaged in the misconduct upon which the suspension was based, and that the suspension fell within the range of penalties prescribed for such misconduct.[20]

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed by the grievance.[21] When parties do not stipulate to the issues, arbitrators have the discretion to frame them, and the Authority accords the arbitrator's formulation substantial deference.[22] The Authority has held that arbitrators do not exceed their authority where the award is directly responsive to the formulated issues.[23]

As noted above, the parties did not stipulate to the issues,[24] and the Arbitrator framed them as whether "the disciplinary action taken against [the grievant was] . . . for just and sufficient cause? If not, what shall the remedy be?"[25] Resolving these issues, the Arbitrator determined that multiple mitigating factors, including those set forth in *Douglas*, supported the Union's position that the

[7] *Id.* at 19.
[8] *Id.* at 21.
[9] *Id.* at 20.
[10] *Id.* (internal quotation mark omitted).
[11] 5 M.S.P.R. 280 (1981).
[12] Award at 22-23 (finding *Douglas* factors 3-6 and 9-12 "favor[ed] the Union's position").
[13] *Id.* (internal quotation marks omitted).
[14] *Id.* at 22 (quoting Exceptions, Ex. 3 (Table) at 1).
[15] *Id.* at 23.
[16] *Id.* at 24.
[17] *Id.*
[18] *See* Exceptions Br. at 11-12.
[19] *Id.* at 11-12, 14-16.
[20] *Id.* at 18 ("The [A]rbitrator clearly found that [the grievant] committed these offenses and he acknowledged that the [table of penalties] called for discipline that, at maximum[,] could have totaled over [thirty] days of total suspension.").
[21] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Victorville, Cal.*, 73 FLRA 835, 836 (2024) (citing *USDA, Food Safety & Inspection Serv.*, 73 FLRA 683, 684 (2023) (*USDA*)).
[22] *Id.* at 836-37 (citing *USDA*, 73 FLRA at 684-85; *AFGE, Loc. 522*, 66 FLRA 560, 562 (2012)).
[23] *Id.* at 837 (citing *USDA*, 73 FLRA at 685).
[24] *See* Exceptions, Ex. 2, Tr. at 6.
[25] Award at 2 (emphasis omitted).

Agency did not have just cause to suspend the grievant.[26] The Authority has stated that the enforcement of a contractual just-cause standard presents two questions: whether discipline was warranted, and if so, whether the penalty assessed was appropriate.[27] Moreover, in the event the Arbitrator found "the disciplinary action taken against" the grievant was not "for just and sufficient cause," the framed issue authorized him to determine a remedy.[28] Accordingly, we find the Arbitrator's consideration of the reasonableness of the penalty – including his remedy – is directly responsive to the framed issue and provides no basis for finding the Arbitrator exceeded his authority.[29]

We deny this exception.

B. The Agency does not demonstrate that the award fails to draw its essence from the parties' agreement.

The Agency argues the award fails to draw its essence from the agreement.[30] The Authority will find that an award fails to draw its essence from an agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[31]

The Agency emphasizes that the Arbitrator found both that the grievant engaged in the charged misconduct and that the table authorized suspensions for a first offense for any of the grievant's three offenses.[32] Thus, the Agency argues the Arbitrator "abandoned the parties' agreement" and "wholly ignore[d]" the table when he recommended his own alternative sanctions.[33] Specifically, the Agency cites the Arbitrator's finding – made as part of his *Douglas* analysis – that "[e]ffective alternative sanctions . . . would have been counseling,"[34] and argues the Arbitrator disregarded the table because counseling is a "remedy not contemplated in the parties' agreement."[35]

Although the Arbitrator found the table "cover[ed]" the grievant's offenses, he also noted the table's explanation that it was a "guide" and that "there are many factors to consider" when using it "to determine a reasonable penalty."[36] Consistent with that language,[37] and applying his findings regarding the reasonableness of the penalty, the Arbitrator determined the Agency did not have just cause to suspend the grievant, and he directed the Agency to vacate the suspension.[38] Moreover, the Arbitrator did not direct the Agency to provide counseling as a remedy; he only determined that counseling would have been an effective alternative sanction under the *Douglas* factors. Thus, contrary to the Agency's assertion, the Arbitrator did not "wholly ignore[]" the table,[39] and the Agency does not otherwise demonstrate that the table – or any provision of the parties' agreement – mandates imposition of a penalty without just cause. Therefore, the Agency's argument does not demonstrate how the award is irrational, unfounded, implausible, or in manifest disregard of the agreement.[40]

The Agency also asserts the award "entirely ignores the parties' negotiated agreement in relation to disciplinary procedure, medical leave, and performance evaluation."[41] Aside from this general statement, the Agency provides no explanation as to how the award is

[26] *Id.* at 22-23.
[27] *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 63 FLRA 241, 243-44 (2009) (citing *U.S. DOJ, Immigr. & Naturalization Serv., N.Y. Dist. Off.*, 42 FLRA 650, 658 (1991)); *see also AFGE, Loc. 2142*, 72 FLRA 764, 767 (2022) (Chairman DuBester concurring) (finding arbitrator analyzed whether agency had just cause to discipline grievant "as evidenced by the [a]rbitrator's consideration of whether the grievant engaged in the alleged misconduct and received an appropriate disciplinary penalty").
[28] Award at 2 (emphasis omitted).
[29] *AFGE, Loc. 2382*, 58 FLRA 270, 271 (2002) (Chairman Cabaniss concurring) (where framed issue was whether a suspension was for just cause, arbitrator's reduction of grievant's suspension to a warning did not exceed arbitrator's authority); *AFGE, Loc. 22*, 51 FLRA 1496, 1498-99 (1996) (reduction of suspension to written reprimand did not exceed arbitrator's authority to determine whether discipline was for just cause).
[30] Exceptions Br. at 17-19.
[31] *U.S. Dep't of Energy, Off. of River Prot./Richland Operations Off., Hanford, Wash.*, 73 FLRA 506, 508 (2023) (*Energy*) (citing *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023)).
[32] Exceptions Br. at 18 (citing Award at 22).
[33] *Id.*
[34] *Id.* (quoting Award at 23) (internal quotation marks omitted).
[35] *Id.*
[36] Award at 22 (quoting Table at 1) (internal quotation mark omitted).
[37] Table at 1 (further stating that the table is not "all[-]inclusive or restrictive").
[38] *See* Award at 22-23.
[39] Exceptions Br. at 18.
[40] *See Energy*, 73 FLRA at 508 (denying essence exception asserting that arbitrator disregarded the agency's table of penalties when mitigating discipline, where table stated that penalties therein were not absolute and were subject to consideration of other factors); *U.S. DOJ, Exec. Off. for Immigr. Rev.*, 66 FLRA 221, 226-27 (2011) (denying essence exception challenging arbitrator's recission of imposed discipline where arbitrator found agency lacked just cause (citing *SSA, Huntington Park Dist. Off., Huntington Park, Cal.*, 63 FLRA 391, 392 (2009); *U.S. Dep't of the Interior, Nat'l Park Serv., Gettysburg Nat'l Mil. Park*, 61 FLRA 849, 853 (2006) (Member Pope writing separately as to another matter))).
[41] Exceptions Br. at 18.

inconsistent with any provision of the parties' agreement concerning these matters. Relying on the assertions set forth in its essence exception, the Agency also alleges – as part of its essence exception – that the award is "contrary to . . . law."[42] However, the Agency cites no law with which the award allegedly conflicts, and does not otherwise explain the basis for this allegation. Therefore, we deny these arguments as unsupported.[43]

We deny the Agency's essence exception.

IV. Decision

We deny the Agency's exceptions.

[42] *Id.* at 19.

[43] 5 C.F.R. § 2425.6(e)(1) (an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c)); *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 747, 750 (2023) (denying essence argument as unsupported where excepting party did not explain how award failed to draw its essence from cited provision (citing *U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016))).

Chairman Kiko, concurring:

With reluctance and a good deal of frustration, I join in denying the Agency's exceptions because I agree that none of the Agency's arguments provide grounds for setting aside the award. However, I write separately to address the glaring flaw in this award. Although the Arbitrator found the grievant "committed three different offenses – some repeatedly,"[1] he nonetheless set aside the discipline *entirely* without directing any replacement penalty.[2] When parties entrust arbitrators with assessing whether an agency properly exercised its disciplinary discretion,[3] they do so with the understanding that the arbitrator will safeguard the guiding principle for disciplinary action under 5 U.S.C. Chapter 75: that proper disciplinary actions "promote the efficiency of the service."[4] In directing *no penalty at all* for the grievant's misconduct, the Arbitrator in this case utterly failed to safeguard this principle.

The grievant's behavior in this case is undisputed.[5] On September 11, 2020,[6] the grievant's supervisor (supervisor) returned via email three "high priority" loan applications with deficiencies for the grievant to correct.[7] The grievant did not respond to those emails.[8] On October 15, the supervisor returned another loan application with deficiencies for the grievant to correct.[9] The grievant did not respond.[10] On October 27, the supervisor emailed the grievant asking why she had not completed any loans during the past several weeks and requested a response by the end of the day.[11] The grievant did not respond.[12] On October 30, the supervisor emailed the grievant directing her, by the end of the day, to: (1) provide him with her plans for managing her workload due to her upcoming annual leave; (2) provide him with a list of loans she anticipated would be completed; and (3) explain why she had not completed any loans for the past several weeks.[13] The grievant did not respond.[14] On November 5, the supervisor emailed the grievant asking her to take a look at one of her previous "loan denial recommendations" that had been reviewed and determined to be eligible and provide him with an explanation of whether she agreed with the eligibility determination by November 9.[15] The grievant did not respond.[16] On November 13, the supervisor emailed the grievant asking for a status update by the end of the day.[17] The grievant responded by attaching a "production report,"[18] which reflected no work accomplished between September 11 and November 17 on correcting the deficiencies in the four priority loans returned for her review.[19]

On November 17, the grievant emailed her entire team canceling a weekly meeting "for a couple of months" as she would be on leave until December 19.[20] The supervisor responded to the grievant's email informing the team that the meetings were not cancelled,[21] and to the

[1] Award at 22.
[2] *Id.* at 24.
[3] *See Quinton v. Dep't of Transp.*, 808 F.2d 826, 829 (Fed. Cir. 1986) ("The choice of penalty for an employee's misconduct is a matter largely committed to the discretion of the agency."); *id.* (reviewing bodies should "defer to the judgment of the agency regarding the penalty unless it appears totally unwarranted in the circumstances" (citing *Brewer v. U.S. Postal Serv.*, 647 F.2d 1093, 1098 (1981), *cert. denied*, 454 U.S. 1144 (1982))); *Miguel v. Dep't of the Army*, 727 F.2d 1081, 1083 (Fed. Cir. 1984) ("It is a well-established rule of civil service law that the penalty for employee misconduct is left to the sound discretion of the agency.").
[4] *Cf.* 5 U.S.C. § 7503(a) ("[A]n employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service."); *U.S. Dep't of Transp., FAA*, 63 FLRA 383, 385 (2009) (finding requirements that discipline be for the "efficiency of the service" are functional equivalent to requirements that discipline be for "just cause").
[5] Award at 15-17 (reciting Union's argument that, while the Agency met its "evidentiary burden" concerning her behavior, it failed to demonstrate that the imposed discipline was reasonable).
[6] All dates occurred in 2020 unless otherwise noted.
[7] Award at 3.
[8] *Id.*
[9] *Id.* at 4.
[10] *Id.*
[11] *Id.*; Exceptions, Composite Ex. 1K, Oct. 27 Email to Grievant ("Please make sure you[r] input is accurate. Is there some reason there have not been any loans completed the past several weeks? This is a bit unusual. You are to provide a response today.").
[12] Award at 4.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*; Exceptions, Composite Ex. 1N, Nov. 10 Email to Grievant at 1 ("Juan found this one eligible and I have not heard back from you on my requests. Please review and let me know whether you agree with your original denial recommendation.").
[17] Award at 5.
[18] *Id.*; *see also* Exceptions, Composite Ex. 1E, Email from Management to Loan Officers at 4 (directing loan officers to "[p]lease send your supervisor your *daily* production report[s]" (emphasis added)).
[19] Exceptions, Composite Ex. 1X, Notice of Suspension (noting that a "loan production report covering September 11, 2020[,] to November 17, 2020[,] indicates that you did not work on correcting the deficiencies of [four] priority . . . loan[s]."). The grievant testified that the production report did not capture work performed to correct deficiencies on previous submitted loans appraisals. Exceptions, Agency's Ex. 2, Tr. at 419. However, the grievant provided this report – without explanation – in response to her supervisor's repeated requests for updates on the work she had done over that two-month period. Award at 5. If the production report was not representative of her work, then it was not responsive to her supervisor's request.
[20] Exceptions, Composite Ex. 1S at 3.
[21] Exceptions, Composite Ex. 1T at 1.

grievant individually informing her that she was "not to reach out [to] the entire team without [his] express approval in the future . . . [u]nderstand?"[22] The grievant responded to the supervisor's email with "[n]o I do not understand . . . [s]end it again pl[ea]s[e] . . . maybe in different words."[23] The supervisor responded: "I direct you not to reach out [to] the entire team without my express approval in the future unless you run your message by me prior to distributing it to the team."[24] The grievant responded: "I do hope at some point in your career you learn how to communicate without being rude and obnoxious."[25]

Based on the above conduct, the Agency charged the grievant with three misconduct violations: unsatisfactory performance, failure to follow directives, and unprofessional communication.[26]

As part of a government-wide effort to improve disciplinary processes,[27] the U.S. Government Accountability Office recommended that each federal agency create a "table of penalties" to: (1) "help ensure the appropriateness and consistency of a penalty in relation to [the misconduct];" and (2) "help ensure the disciplinary process is aligned with merit principles because [tables of penalties] make the process more transparent, reduce arbitrary and capricious penalties, and provide guidance to supervisors."[28] The Agency took this recommendation seriously by instituting a table of penalties within a year.[29] While this table of penalties is not binding, its purpose is to create a consistent, reliable disciplinary process.[30]

Reviewing this table of penalties, the Arbitrator properly noted that it covered all of the misconduct alleged, with appropriate penalties ranging from a reprimand to a multi-day suspension *for each offense*.[31] And the Arbitrator found the grievant engaged in *all* of the charged misconduct.[32] In other words, she was not performing her assigned "high priority" work;[33] she repeatedly failed to respond to her supervisor's requests for updates on her work over the course of several weeks;[34] and she sent unprofessional messages to her supervisor when he directed her not to take unilateral action without his approval.[35] Based on these findings, it should be manifestly clear that *some* discipline was necessary. Moreover, as the Agency noted in its disciplinary decision, the grievant's potential for rehabilitation – one of the factors for selecting appropriate discipline[36] – was low because she accepted almost no personal responsibility for her behavior and expressed no remorse.[37]

However, despite the grievant's clear and repeated misconduct, the Arbitrator "found [the grievant] credible on th[e] narrow issue that she was indeed having a hard time."[38] Although he found no evidence that the grievant's supervisor was "culpable" in creating a stressful work environment, he concluded "that the grievant was

[22] Exceptions, Composite Ex. 1S at 2.
[23] *Id*.
[24] *Id*. at 1.
[25] *Id.*
[26] Award at 6.
[27] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-48, FEDERAL EMPLOYEE MISCONDUCT: ACTIONS NEEDED TO ENSURE AGENCIES HAVE TOOLS TO EFFECTIVELY ADDRESS MISCONDUCT (2018), https://www.gao.gov/assets/d1848.pdf.
[28] *Id.* at 31.
[29] Exceptions, Agency's Ex. 3, Table of Penalties ("Effective Date: May 7, 2019").
[30] *Id.* ("[W]henever possible, this table should be used as a guide to determine a reasonable penalty.").
[31] Award at 22 ("The 'Table [of Penalties]' . . . does cover the grievant's purported 'misconduct.'").
[32] *Id.* at 19.
[33] *Id.* at 3.
[34] *Id.* at 19 ("[T]he grievant ignored [the supervisor's] requests and later directions . . . [that] would normally warrant corrective disciplinary action . . . for [failure] to follow legal orders.").
[35] *Id.* ("[T]he grievant's email calling her immediate supervisor . . . rude and obnoxious would [constitute] conduct included in the Agency's [t]able of [p]enalties described as insolence and unprofessional language.").
[36] *See Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305-06 (1981) (*Douglas*) (listing the relevant factors for assessing the appropriateness of disciplinary action).
[37] Award at 18 (noting Agency's position that the grievant neither accepted responsibility nor expressed remorse in her written reply to the notice of proposed discipline); *see also* Exceptions, Composite Ex. 1Z, Grievant's Resp. to Proposed Discipline at 2 (regarding unsatisfactory-performance charge, grievant responded that sometimes cases temporarily "fall through the cracks" and "I thought I had done what I was supposed to do, unfortunately technology failed me in this instance"); *id.* (responding to charge of failure to follow direction from supervisor that unresponsiveness to repeated messages was "inadvertent" and that "I was of the understanding that unresponsiveness and non-production were quarterly and year-end performance issues"); *id.* at 3 (responding to improper-communication charge: "My response to [my supervisor] was never intended to be unprofessional[;] it was an effort to help improve communication, that[is] all. All I can say at this point is that I will be mindful in my communication and the timeliness of responses in [the] future.").
[38] Award at 21.

indeed experiencing a great deal of stress and anxiety."[39] Based purely on this finding, the Arbitrator determined that the Agency's decision to issue the grievant a three-day suspension – for three separate misconduct charges – was unreasonable.[40] Thus, he set aside the suspension entirely without directing a replacement penalty.[41]

The Authority and the Merit Systems Protection Board have recognized that mitigating factors, such as unusual job tensions, personality problems, or mental impairment, may be considered in determining whether a particular penalty is reasonable.[42] But mitigating circumstances are not defenses that justify or excuse behavior; rather, they provide context that may help explain improper behavior, and, thus, may support *reducing* the otherwise appropriate penalty.[43] However, it is clear that the Arbitrator misunderstood the concept, finding that the Union's introduction of "mitigating facts" "effectively rebutted the [Agency's] prima facie case."[44] As noted above, the Arbitrator found the grievant engaged in the charged misconduct.[45] Moreover, the Arbitrator specifically noted that "counseling" would have been an "[e]ffective alternative sanction[]."[46] Thus, the Arbitrator determined that the Agency *could* sanction the grievant for her conduct. But rather than directing the Agency to replace the suspension with counseling or any other lesser penalty, he simply erased the consequences for the grievant's misconduct charge entirely.[47]

I am frankly baffled that the Arbitrator thought that completely insulating the grievant from accountability was the correct result. When arbitrators send the signal that employees can ignore their responsibilities, disregard direct and lawful orders, and hurl abuse at their supervisors without the slightest consequence, agencies lose the ability to maintain order and operate effectively. Rather than basing his analysis on the core principle at issue – promoting the efficiency of the service – the Arbitrator erroneously based the grievant's absolution on nothing more than his own personal sense of industrial justice.[48]

Unfortunately, as I noted above, the Agency does not raise proper grounds for vacating the award. The Agency's exceeded-authority exception is premised on a misunderstanding of the scope of just-cause determinations. And the Agency's essence exception fails to demonstrate either that the table of penalties was a negotiated agreement or that the award contradicts the plain wording of any negotiated contract provision. Thus, while I am extremely troubled by this result, I am also constrained to concur with the denial of the Agency's exceptions. However, I would also like to strenuously remind arbitrators of their responsibility to ensure the proper function and efficient operation of the Federal government. As part of that responsibility, they must recognize that, even where mitigating circumstances exist to lessen penalties, *clear proven misconduct must not go unaddressed*.

[39] *Id.* at 20. Notably, as evidence that the grievant was "having a hard time," the Arbitrator observed that her supervisor even asked her if anything was wrong because "she seemed a 'bit unusual.'" *Id.* at 21. I find this characterization of the evidence strange because the supervisor was not commenting on the grievant's emotional state; instead, he was simply asking her – repeatedly – why she was not performing her assigned work. Exceptions, Composite Ex. 1I, Oct. 19 Email to Grievant at 1 ("Is there some reason there have not been any loans completed [in] the past several weeks? This is a bit unusual."); Exceptions, Composite Ex. 1K, Oct. 27 Email to Grievant at 1 ("Is there some reason there have not been any loans completed [in] the past several weeks? This is a bit unusual. You are to provide a response today.").

[40] Award at 22-23.

[41] *Id.* at 24.

[42] *See U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 71 FLRA 304, 305-06 (2019) (Member DuBester concurring) (denying exception challenging arbitrator's consideration of mitigating factors when reducing fourteen-day suspension to letter of reprimand); *Douglas*, 5 M.S.P.R. at 305 (listing factors for evaluating reasonableness of penalty, including "mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter").

[43] *See Mitigating Circumstance*, Black's Law Dictionary (12th ed. 2024) ("A fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce . . . the punishment . . . ."); *see also Bryant v. Veterans Admin.*, 10 M.S.P.R. 391, 393 (1982) (noting that presiding official "confuse[d] a factual decision" – whether the charge was supported – with "consideration of the mitigating or extenuating circumstances surrounding" the charge, which concern "the appropriateness of the penalty imposed by the agency").

[44] Award at 19; *see also id.* ("If there was no evidence to the contrary[,] her failure would normally warrant corrective disciplinary action.").

[45] *Id.*

[46] *Id.* at 23.

[47] *Id.* at 24 ("The three-day suspension shall be removed from her record.").

[48] *Cf. U.S Dep't of VA, James A. Haley Veterans Hosp.*, 71 FLRA 699, 701 (2020) (Member DuBester dissenting) ("The Authority has held that an award's remedy must comport with the parties' agreement when that agreement defines the actions an agency can take in disciplinary matters."); *SSA Lansing, Mich.*, 58 FLRA 93, 95 (2002) (Member Pope dissenting) (award deficient where arbitrator found agency had just cause to discipline grievant yet set aside the disciplinary action in its entirety); *U.S. DOJ, INS, Del Rio Border Patrol Sector, Tex.*, 45 FLRA 926, 933 (1992) (same).